No. 14635

In the
United States Court of Appeals
For the Ninth Circuit

NICK JOHN KALINE,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

J. B. TIETZ
534 Douglas Bldg.
257 S. Spring St.
Los Angeles 12, Calif.
Attorney for Appellant.

TOPICAL INDEX

TABLE OF CASES AND AUTHORITIES CITED

Cases

Codes

Textbooks

In the
United States Court of Appeals
For the Ninth Circuit

NICK JOHN KALINE, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 14635

Appellant's Opening Brief

JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Central Division. The appellant was sentenced to custody of the Attorney General for a period of four years. [R 12-13]* Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27(a)(1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [R 14]

*R refers to the printed Transcript of Record.

STATEMENT OF THE CASE

Appellant was indicted under U.S.C., Title 50, App. Sec. 462 (Universal Military Training and Service Act) for refusing to submit to induction. [R 3]

Appellant pleaded Not Guilty, waived jury trial and was tried on November 23, 1954. [R 5] Appellant was convicted by Judge James M. Carter on December 13, 1954 [R 9-10] and sentenced on December 20, 1954. [R 11-12]

At the close of the evidence, a Motion for Judgment of Acquittal was made, argued and denied [R 7-10]; the motion was renewed on December 20th, and denied and at the same time a Motion for New Trial was made and denied. [R 10-12]

THE FACTS

Appellant registered with Local Board No. 110 on September 8, 1948. [Ex 1-2]* He filed his 8-page Classification Questionnaire on December 13, 1948. [Ex 4-12] In it he showed he was a student at Pacific Bible College preparing for the ministry of the Pilgrim Holiness Church. [Ex 6, 9] He stated he had no physical or mental condition that would disqualify him from service in the Armed Forces. [Ex 10] However, when he registered, he had shown he had been rejected by the Armed Forces in 1945. [Ex 1] On January 4, 1949 a reply was received by the local board, from the Records Section of the Selective Service Sys-

*Ex refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

tem, showing that the reason for the 1945 rejection was "valvular heart disease." [Ex 13]

On the said January 4, 1949 the local board wrote appellant he should file a letter from the Pacific Bible College corroborating his claim to a divinity student status. [Ex 14] Although he promptly procured such a letter [Ex 15] and although no effort was made to give him a physical exam or to otherwise rebut his claim that he was currently in good health he was classified in Class IV-F (unfit). By virtue of a 1951 change in the law being in this classification extended his liability to age 35.

On December 18, 1951 he was reclassified in I-A and *thereafter* given a physical exam which revealed his current condition was good. [Ex 11]

Since he had previously asked for the Special Form for Conscientious Objectors, it [Ex 19-22] was sent him on January 10, 1952, and upon its return, he was reclassified in Class I-O, on March 1, 1952. [Ex 11]

On October 20, 1952, he was mailed a form on which to volunteer for civilian work [Ex 24] and upon his failure to volunteer (rather than await his turn) he was reclassified in Class I-A.

He was notified of said reclassification and, upon his timely complaint [Ex 25] he was ordered to appear before the local board [Ex 11] and after the hearing was reclassified in Class I-A-O (non-combatant). He complained again and the file was sent to the Appeal Board.

The Appeal Board retained him in said I-A-O classification.

During the trial, the following transpired:

1. Defendant's subpoena duces tecum [Hearing Officer and FBI reports] was quashed. [R. 26]
2. The Government introduced the selective service file as its sole evidence. [R. 28]

QUESTIONS PRESENTED AND HOW RAISED

I.

Concerning Advisors to Registrants: the evidence showed that the names and addresses of Advisors to Registrants were not posted on the bulletin board, and, in fact, the board had no Advisors to Registrants. There was also testimony that he was prejudiced by having no Advisor.

The question presented may have two parts: first, is the failure of the local board to comply with the regulations, mandatorily requiring such action, in itself a denial of due process; second, if a showing of prejudice is required, did appellant's evidence meet the requirements?

This, and all subsequent questions, were raised by Motion for Judgment of Acquittal.

II.

Concerning failure of proof of crime: the evidence showed that appellant had not been afforded an oppor-

tunity to go through with the induction ceremony, that is, to refuse to "step forward" after being warned of the penalty.

The question presented, appellant submits, is precisely that considered and decided in *Chernekoff v. United States,* ..... F2 ....., (9 Cir., No. 14370, decided Feb. 24, 1955).

III.

Concerned the Hearing Officer hearing: the evidence showed:

A. No copy of this officer's report to the Department was ever placed in the file or sent appellant;

B. No copy of the Department's recommendation was placed in the file until after the Appeal Board's decision.

C. The conclusions in the above documents are inconsistent with and are not supported by the findings of fact and also are based on artificial considerations.

D. The Hearing Officer should have given appellant a second chance for a hearing.

E. The trial court erred in quashing the subpoena; at least as *in camera* inspection should have been made to compare the FBI report with the Hearing Officer's report.

The question raised is any of the above, individually or collectively to be considered a denial of due process?

IV.

Concerning extension of liability: appellant was given as unrequested IV-F classification, without physical examination, and contrary to the evidence of his current good health and was simultaneously denied a minister's classification although his evidence for it was prima facie good and unrebutted.

The question raised is: on such a set of facts may a minister's classification be denied and may an "unfit" classification be imposed?

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motions for judgment of acquittal.

II.

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

POINT ONE

It is a denial of due process for a local board to fail to have Advisors to Registrants.

Chernekoff vs. United States, supra.

If a showing of prejudice is needed this appellant's evidence met the test.

POINT TWO

There is a failure of proof of the crime charged.

Chernekoff, supra is squarely in point.

POINT THREE

The facts surrounding the Hearing Officer hearing reveal five denials of due process. The Supreme Court recently disposed of two of the sub-points in accord with appellant's position in *Gonzales* and of another in *Simmons;* this Court may choose to also rule on the remaining point.

POINT FOUR

Appellant's liability beyond age 26 was illegally extended; concurrently, he was illegally denied an exempt classification.

ARGUMENT

POINT I.

DEFENDANT WAS DENIED DUE PROCESS IN THAT THE LOCAL BOARD FAILED TO HAVE AVAILABLE AN ADVISOR TO REGISTRANTS AND TO HAVE POSTED CONSPICUOUSLY OR ANY PLACE, THE NAMES AND ADDRESSES OF SUCH ADVISOR, AS REQUIRED BY THE REGULATIONS, AND TO THE DEFENDANT'S PREJUDICE.

Lt. Col. Keeley testified that the local board never posted the names and addresses of Advisors to Registrants on its bulletin board, and in fact, never had any. [R. 31]

Section 1604.41 of the Selective Service Regulations, at all times, up to January 31, 1955, has been:

> ADVISORS TO REGISTRANTS
>
> 1604.41 APPOINTMENT AND DUTIES—Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service form and to advise registrants on other matters relating to their liabilities under the Selective Service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

Had there been an Advisor's name and address posted, Kaline could have gone to him, learned that he could inspect his file, there discovered that the Appeal Board was trying to get him a new date and, with the advice of the Advisor, pushed the matter to success. See page 45 of the Exhibit showing that the Appeal Board did make a second attempt, on February 17, 1954, to get him another Hearing before the Hearing Officer after he had failed to appear on the 4th. This Court indicated in *Chernekoff supra* that the failure to comply with the regulations itself presents a serious question. At least one trial court has held that the failure of the board to have an Advisor, coupled with a showing that the defendant was in some way injured by the board's failure, required an acquittal.

Such was the holding of Judge Peirson Hall in *United States vs. Kariakin,* No. 23223, S. D. California, January 12, 1954:

> "MR. TIETZ: Your Honor has heard me on all the materials that I wish to present.
>
> THE COURT: Very well.
>
> I am inclined to think that your point is good in connection with the matter of not being properly advised of his rights. You call it a matter of defective notice.
>
> MR. TIETZ: Yes, sir.
>
> THE COURT: I do not know that it could be so classified as a defective notice because I do not know that they are required by any regulation to give a notice which includes that.

MR. TIETZ: But they do. That is what I was trying to establish.

THE COURT: They do that as a matter of practice and it is not—in other words. I do not think the practice can result in the creation of right to a person to commit a crime, but I do think that under the regulations and the Selective Service procedure that these men are entitled to have advisors and persons performing the function of advisors and they are entitled to be able to look to them for advice and to be told by them what their rights were. In this case he was entitled as a matter of right to receive the fair summary of the adverse testimony if he requested it, but he was never adviser that he had the right to request it, either by the notice and the fact that they do now contain that notice, which I understand you stipulated to is evidence that the Selective Service System recognized that they are entitled to have that advice and were entitled to have that advice.

For that reason I think that the defendant here was deprived of his right to that advice and that the regulations were not followed in that respect and he should be and is acquitted, and his bond is exonerated.

MR. TIETZ: Thank you."

On January 31, 1955, the regulation was amended by E. O. 10594 and the mandatory nature of the requirement was made permissive. This implied admission should be considered by the Court to require reversal regardless of any specific evidence that appellant was prejudiced. To paraphrase what the Supreme

Court said in *Simmons v. United States,* ..... U. S. ....., No. 251, decided March 14, 1955 with respect to another denial of due process: Appellant has been deprived of a fundamental safe-guard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation.

POINT II.

THERE WAS NO PROOF OF THE CRIME CHARGED IN THAT THERE WAS NO PROOF APPELLANT HAD BEEN WARNED OF THE PENALTY FOR REFUSAL TO SUBMIT TO INDUCTION AND THEREAFTER GIVEN THE OPPORTUNITY TO "STEP FORWARD."

The evidence in this case is identical (except for the name of selectee and the date of the abortive induction ceremony) with that in the case of *Chernekoff vs. United States, supra.* See pages 57 and 58 of the Exhibit.

It is submitted that the Chernekoff decision is dispositive of this point.

POINT III.

THE CIRCUMSTANCES CONNECTED WITH THE PART PLAYED BY THE HEARING OFFICER IN THE ADMINISTRATIVE APPEAL, REVEAL ONE OR MORE DENIALS OF DUE PROCESS.

A. No copy of this officer's report to the Department was ever placed in the file or sent appellant.

This failure to afford registrants an opportunity to rebute adverse evidence, and conclusions of the hearing officer is the result of two things: (1) the absence of a selective service regulation requiring that the registrant be given such an opportunity and (2) the policy of the Department of Justice not to give the registrant copies. This situation was recently considered by the Supreme Court and it declared invalid the procedure of the Department in deciding conscientious objector cases. It held that the above procedure constituted a denial of due process.

It is submitted that *Gonzales vs. United States,* ..... U. S. ....., No. 69, decided March 14, 1955, is dispositive of the question.

B. No. copy of the Department's recommendation was placed in the file until after the Appeal Board's decision.

The comments on "A", above, apply equally to this point.

C. The conclusions in the above two documents are inconsistent with and are not supported by the

findings of fact and also are based on artificial considerations.

Page 49 of the Exhibit shows that the machine shop work of the defendant on "government subcontracts" was considered adverse by the Attorney General, and, we can presume, by the Appeal Board.

Nothing whatever is said in the Act or the Regulations or in the legislative history that indicates anything to the effect that if a person is willing to do a certain type of work he cannot be considered a conscientious objector having conscientious scruples to participation in war in any form even though he was willing to perform secular defense work as a means of employment. If the unreasonable interpretation placed upon the act is accepted it will authorize an unending and uncontrollable scope of inquiry. Every type of work and act that may be conceivably thought of can be relied upon to determine and deny the conscientious objector status.

Congress did not intend to allow an inquest to be held as to the kind of work that a registrant did or was willing to do. Congress intended to protect every person who had conscientious objections based on religious grounds to participation in war in any form. Congress did not make the factors relied upon in this case as any basis in fact for the denial of the conscientious objector claim.

Neither the Act nor the Regulations make the type of work that a person does a criterion to follow in the determination of his conscientious objections. The sole questions for determination of conscientious objections are (1) does the person object to participation in the armed forces as a soldier? (2) Does he believe in the Supreme Being? (3) Does this belief carry with it obligations to God higher than those owed to the state? (4) Does his belief originate from a belief in the Supreme Being and not from a political, sociological, philosophical or personal moral code?

Kaline's case commands affirmative answers to all these questions. He fits the statutory definition of a conscientious objector.

It is entirely irrelevant and immaterial to hold that there was basis in fact because Kaline was willing to work in a steel plant. This was not an element to consider and in any event it was no basis in fact according to the law for the denial of his claim. It did not impeach or dispute in any way what he said in his questionnaire and conscientious objector form, all of which was corroborated by the FBI report. *The law does not authorize the draft boards to invent fictitious and foreign standards and use them* to speculate against evidence and facts that are undisputed.—*Annett vs. United States,* 205 F. 2d 689 (10th Cir.); *United States vs.*

Alvies, 112 F. Supp. 618 (N.D. Cal. S.D. 1953); *United States vs. Graham,* 109 F. Supp. 377 (W.D.Ky. 1952); *United States vs. Everngam,* 102 F. Supp. 128 (D. W. Va. 1951).

D. The Hearing Officer should have given appellant a second chance for a hearing.

(1) There are two arguments in this point. The first argument is based on the fact that appellant received his invitation from the Hearing Officer several days late but promptly asked for a second chance. [R. 32-33] It was an abuse of discretion for the Hearing Officer to not give the defendant a new date for the hearing that Congress provided. This hearing is the chief check provided by Congress to avoid local prejudices. When a registrant promptly points out to the Hearing Officer that he received his mail late, it is more than courtesy to give him another chance; fair dealing requires it. Two courts have so held in similar situations. On May 15, 1953, in the Southern District of California Chief Judge Yankwich held, in *United States vs. Waterfield,* No. 3143-ND:

> "THE COURT: Gentlemen, I think this man was not given due process. I do not believe, when a man makes a request, that a Board can send a letter and then, when notified by the defendant's mother that he is away temporarily, just say "We won't give you another date."
>
> Obviously, the law does not require the man to hold himself at military attention and salute

the moment he asks for a personal interview. He has a right to be treated as reasonable human beings are. This man asked for a personal interview. The letter from the Board reached his home while he was out of town. It is not required for a man, when he has been classified by a Board, to remain in town at the Board's beck and call. The Board should be reasonable about it.

In this particular case, supposing the man's mother had not lived there, and the letter had reached his home while he was gone? You couldn't put him in default when the man hasn't received the letter. As a matter of fact, in law we allow three days extra service by mail, on the presumption it might be delayed; but this man's mother opened the letter, and she called up, and the Secretary of the Board wrote down, "The mother says he is out of town." Then when he came back, he went down immediately, and they said, "It is too bad, you are too late." In the meantime they had written, "Request for another hearing, oral, denied. The registrant did not appear."

They knew why he didn't appear. That is not a frank statement. In typewriting, on page 35 of the record, appears:

> "Jack Howard Waterfield, 4-79-31-58
>
> November 3, 1952
>
> Jack Howard Waterfield's mother called and said that he is out of town and would not be in today. Would like another appointment for next Monday.
>
> I told her that I would put it up before the local board."

In spite of that, she writes below,

"Registrant did not appear 11/3/52."

He wasn't there; he hadn't received the notice. He had been out of town.

"Request for another appearance denied."

So they denied it arbitrarily, depriving him of the right of appeal, and that is not due process.

I find the defendant not guilty, as the only method of correcting an injustice. This man was entitled to a personal appearance, and he did not get it, and they had no right to say he had to stay around. That is not due process, as I understand, so the man is found not guilty.

MR. TIETZ: Bond exonerated, your Honor?

THE COURT: Bond exonerated."

On August 5, 1954, in the Southern District of California, the late Judge Beaumont held, in *United States vs. Williams,* No. 3230-ND:

"MR. KWAN: In this case, your Honor, he has been given the full requirements of the selective service system in so far as appearance before the draft board.

MR. TIETZ: We dispute that. He asked for a personal appearance, and he didn't get his mail, and he begged for another chance. 'Give me another date', he said.

THE COURT: I am interested in that phase, Mr. Tietz. What was the testimony in regard to his asking for another chance here?

MR. TIETZ: It is written, your Honor; it is in the file. I will be able to turn to it in a moment, I think. Page 32. Page 36 is their denial.

THE COURT: Page 32, is it? Well, read it.

MR. TIETZ: 'Local Board No. 70, Fresno County, 472 Palm Avenue, Fresno, California. Gentlemen: 'I was granted a personal appearance before your board on February 12. However, I did not receive the notice of the appearance until February 16, so could not be there. I will be glad to come if you will grant me another hearing.

'Please change my address to 305 E. Bunny Avenue, Santa Maria so that I will receive my mail on time.

'Leeman Williams'

Then following are some envelopes to bear it out. And then on page 36 we have a copy, carbon copy apparently, of a letter sent to Leeman Williams, General Delivery, Santa Maria, California:

'Dear Sir: Referring to your undated letter regarding your request for personal appearance, this is to advise you that you were granted an appearance before this Board within the 10 days allowed and you failed to appear. This 10 day period may not be extended. (SSS Reg. 1624-1(a). Your file has been forwarded to the Appeal Board for action.'

They are wrong on the law. They probably did not allow it out of ignorance; they thought they could not give him another date. They are wrong. If he had placed his initial request after the ten-day period, then they would have been right, but since his initial request was within the ten-day period and in writing, the mere fact that one date was not satisfactory for any reason, whatsoever, to them or to him, they could give him another date. They do that all the time. Sometimes the

board member is ill, and sometimes the registrant says 'I'll be in New York' and for that reason they give him another date.

MR. KWAN: It is not true the request was made within ten days.

MR. TIETZ: The fact they gave the hearing, page—

THE COURT: What is not true?

MR. KWAN: It is not true he made a request within the ten-day period.

THE COURT: Let's look at the facts.

MR. TIETZ: Page 31.

THE COURT: Page 31. Leeman Roy Williams,—that is February 8th. 'Your request for a personal appearance before the members of the local board has been granted. An appointment has been made for you to appear on February 12th', and this was received on February 25th . . . [Defendant recalled to witness stand and 6 pages of testimony with argument intervened]

THE COURT: Well, I think the Court must accept this young man's testimony in regard to the matter, and I think he should have been given the personal appearance, the extension of the personal appearance.

What were you going to say?

MR. KWAN: Your honor, I might submit to the Court the fact that once he has been classified by the local board and after he has been classified by the Appeal Board, the classification by the Appeal Board supersedes the entire proceedings, and if there were any error in the local board's classification it has been cured by the action of the appeal board.

MR. TIETZ: A novel interpretation.

THE COURT: The Court will find the defendant not guilty. The bond is ordered exonerated.

MR. TIETZ: Thank you."

Time and again the courts have pointed out (by acquitting or reversing convictions) that hearings are of the utmost importance to registrants and that a denial, under circumstances calling for one, is a denial of due process.

See *Davis vs. United States,* 150 F. 2d 308;
United States vs. Romano, 103 F. Supp. 547;
United States vs. Peterson, 53 F. Supp. 760;
United States vs. Laier, 52 F. Supp. 392.

Especially see *United States vs. Hufford,* 103 F. Supp. 859, where "The local board refused to grant the registrant a further opportunity . . ." The Court declared:

> "Though the local board may have been technically correct in refusing to grant another hearing, such a view appears narrow and not within the spirit of liberality reflected by the regulations." [861]

(2) The second part to this argument is that the file itself (pages 36-46) show that the Appeal Board and the Attorney General wanted him to have this second chance. The reason doubtless is that they wanted a full and fair record.

1. Page 36 shows the initial request of the Appeal Board that the so-called "special appellate pro-

visions for conscientious objectors" be given defendant.

2. Page 39 shows the initial effort made by the Appeal Board to insure that defendant was notified, namely, a check on his address. The local board gave it to the appeal board.

3. Page 40 is crucial. It indicates that the Attorney General, on February 10, 1954, tried to get a new address for the defendant because he had not appeared at the February 4, 1954 date. [Note from the Crotty correspondence, Exhibit A, that Mr. Crotty had promptly notified the Attorney General that defendant had not appeared on the 4th.]

4. Pages 42, 43, 44, and 45 are also crucial. They show that on February 12th the local board told the Attorney General that the only address they had was the Percy Street one, and then, when they received his February 15th notice of change of address to La Habra on the 16th the local board *did not* pass this along to the Attorney General. Then the appeal board itself started an inquiry, to give defendant another chance, and, although *it* was sent the new address on the 17th, the Attorney General was *not* notified by anyone, and on March 15th he sent his opinion (page 47 - .....) to the appeal board.

It is submitted that the failure of the Selective Service System to follow through on this second chance problem was unfair to defendant.

E. The trial court erred in quashing the subpoena; at least an *in camera* inspection should have been made by the trial judge for one or both of the following reasons: (1) to compare the FBI report and the Hearing Officer's report and thus determine if the report was a fair one; (2) to determine if the advantage to the appellant of making it available for use in his defense, outweighed the public interest in preserving FBI secrecy.

The factual basis for this point and the argument on it is found in the printed transcript of Record, pages 18-22.

POINT IV.

DEFENDANT'S LIABILITY FOR SERVICE WAS ILLEGALLY EXTENDED BEYOND AGE 26 ON FEBRUARY 17, 1949 AND HE WAS ILLEGALLY DEPRIVED OF A CLASS IV-D "EXEMPT" CLASSIFICATION ON SAID DATE.

Page 11 of the Exhibit shows that a IV-F classification was given the defendant on February 17, 1949.

This classification gave color of law to the extension of his liability beyond age 26. If the classification was improper it needs no argument that appellant has been prejudiced by it.

The facts are evident from the Selective Service file:

1. Defendant registered on September 8, 1948. [p. 2]

2. He filed his Classification Questionaire on November 1, 1948. [p. 4]
3. He did not then (or ever) claim a IV-F classification. [p. 10, Registrant's Statement Regarding Classification]
4. He did not then (or ever) furnish any information that his current physical condition was impaired. [p. 10, Series XV]
5. In fact, he made flat statements, to the contrary, as follows:

1. "Do you have any physical or mental condition which, in your opinion, will disqualify you from service in the armed forces? Yes ..... No X.

2. If the answer to Question 1 is 'Yes,' state the condition from which you are suffering, none."

6. On the other hand, he had given the board ample evidence that he was a full-time student of the ministry, and under *Dickinson vs. United States,* 74 S. Ct. 152, was entitled to the IV-D Classification.

a. His registration card, September 8, 1948 [p. 1] showed he was a student at Pacific Bible College.
b. His Classification Questionnaire, November 1, 1948 [p. 6] showed again that he was such a student, and later [p. 9] he had been such a student for two years. Nevertheless, the board did not classify him where he clearly belonged, in Class IV-D. He was entitled to it and if he had it it could well be that he would have remained so qualified until after his 26th birthdate. This is emphasized by the fact he thereafter wasn't reclassified for 34 months! As was said in *United States vs.*

Graham, 108 F. Supp. 794, "A full and fair disposition of the defendant's contention at every level of the Selective Service system is the measure of their rights." [797]

7. On January 4, 1949, a mimeographed form came to the local board indicating defendant had been rejected *during World War II* as physically unfit. [p. 13] On the same day the clerk wrote defendant [p. 14] checking up on his current *student status.* His compliance with the request [p. 15] was prompt. Nevertheless, he was not classified in Class IV-D but evidently, solely on the basis of the uncorroborated mimeographed form, *of his condition many years before* [p. 13] was classified in Class IV-F and without any physical examination or even a questioning of the registrant to determine a factual basis for the classification. A later physical examination showed the utter lack of basis in fact for such a determination. [See p. 11, entry of 8/22/52].

Two conclusions therefore appear to be justified:

1. There was no basis in fact for the IV-F Classification; it was made without any attempt to determine the current [controlling] facts.
2. The failure to give him the IV-D (ministerial student) classification flew in the face of the *prima facie* case he made and is contrary to the Supreme Court's *Dickinson decision.*

CONCLUSION

The judgment of the Court below should be reversed.

Respectfully submitted,

J. B. TIETZ
Attorney for Appellant